

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HOWARD BERRY and DAVID BERRY,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

TRANSDEV SERVICES, INC., f/k/a
VEOLIA TRANSPORTATION SERVICES
INC., and TRANSDEV NORTH AMERICA,
INC., f/k/a VEOLIA SERVICES, INC.; and
FIRST TRANSIT, INC.,

Defendants.

No. 2:15-cv-01299-RAJ

**DEFENDANT TRANSDEV'S
OPPOSITION TO DEFENDANT
FIRST TRANSIT'S MOTION
TO DISMISS TRANSDEV'S
CROSSCLAIM**

**NOTING DATE:
NOVEMBER 18, 2016**

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1 Transdev Services, Inc. and Transdev North America, Inc. (collectively, “Transdev”) respectfully request that the Court deny First Transit, Inc.’s Motion to Dismiss Transdev’s Cross-Claim (Dkt. No. 30).

4 I. INTRODUCTION

5 Transdev and First Transit perform different roles under identical contracts with King County to provide paratransit services under the Americans with Disabilities Act. Transdev, as the Service Provider, is responsible for employing the paratransit drivers, while First Transit, as the Control Center, has exclusive responsibility for scheduling and dispatching Transdev’s drivers, including ensuring that the drivers are able to take rest breaks during the day. When Transdev submitted its bid proposal to become King County’s service provider under the contract, Transdev knew that it would have no control over dispatching and scheduling its own drivers, but agreed to give up that control in reliance on the fact that the contract requires the Control Center, First Transit, to ensure that Transdev’s drivers receive rest breaks.

14 Over the course of the contract’s term, First Transit has repeatedly affirmed in correspondence—both to King County and to Transdev—its contractual duty to ensure that drivers receive rest breaks. Now that First Transit has been added as a defendant to this lawsuit, however, First Transit takes the position that its contract does not require First Transit to schedule driver rest breaks and that, even if it did, such a duty would be unenforceable.

19 First Transit’s position ignores the reality—and the explicit terms—of the contractual relationship between King County, Transdev, and First Transit. Not only does First Transit’s contract require it to ensure that Transdev’s drivers receive rest breaks, it also gives First Transit the exclusive control (and duty) to schedule and dispatch Transdev’s drivers. As a result, the **only** means by which Transdev can ensure that its drivers have meaningful opportunities to take rest breaks during their workday is by enforcing First Transit’s contractual duties to Transdev. If the Court dismisses Transdev’s cross-claims against First Transit, Transdev and its drivers will be at the mercy of First Transit without any recourse.

II. BACKGROUND

A. Transdev and First Transit successfully bid for different portions of work on the same King County contract.

On March 1, 2007, King County published a Request for Proposal (“RFP”) titled “Paratransit ACCESS – Service Providers & Control Center.” (Declaration of Austin Rainwater (“Rainwater Decl.”), Ex. A, RFP Cover Page.) The purpose of the RFP was to provide access to public transportation for persons with disabilities in King County pursuant to the Americans with Disabilities Act. The RFP consisted of three parts: “Part A – Instructions and Information about the RFP Process; Part B – Contract King County intends to enter with the selected Proposers; and Part C – Scope of Work.” (*Id.*)

First Transit submitted a bid proposal to become the Control Center Contractor while, at the same time, Transdev submitted a proposal to become a Service Provider Contractor. (Rainwater Decl., Ex. B, Submittal List.) On August 26, 2008, King County published its bid proposal results which, effective August 1, 2008, awarded First Transit the Control Center work and awarded Transdev—formerly Veolia Transportation Services, Inc.—the Service Provider work.¹

The RFP published by King County included the contract that would govern both the Control Center and Service Provider (containing the scope of work for both within the same contract), and which both First Transit and Transdev ultimately executed (albeit separately) with King County. In reliance upon the identical terms of the contract that would bind both the Service Provider and the Control Center to their respective scopes of work—and in reliance upon the duties that each would owe to one another—Transdev executed its contract with King County to become the Service Provider. (Declaration of Dan Bartz ¶¶ 4, 8 (“Bartz Decl.”).)

¹ Solid Ground, not a party to this lawsuit, also made a successful bid as a Service Provider Contractor, but it generally services different territory than Transdev. (*See* Rainwater Decl., Ex. B, Submittal List.)

1 **B. Under their identical contract with King County, the Control Center (First**
2 **Transit) has responsibility for dispatching and scheduling Transdev's**
3 **drivers.**

4 King County accepted Transdev and First Transit's respective bids, designating First
5 Transit as the Control Center and Transdev as the Service Provider. As contemplated by the
6 parties, the provisions in the contract King County executed with Transdev were identical to
7 the provisions in the contract it executed with First Transit, the only exception being that the
8 bid proposals are attached and incorporated at the end of each party's contract. *Compare* Dkt.
9 No. 31-2, First Transit Contract, *with* Dkt. No. 31-1, Transdev Contract (collectively referred to
10 as the "Contract"). The fact that the contracts' terms were identical was crucial to both the bid
11 process and to the parties' respective performance of their duties. Because the contracts' terms
12 are identical, Transdev (and First Transit) were able to rely on their respective scopes of work
13 and bid based on the explicit duties the parties owe to one another. (Bartz Decl. ¶ 7.)

14 Section 4 of the Contract, the "Scope of Work Paratransit Access," sets forth the
15 following "Service Model," whereby the Control Center (First Transit) has complete control
16 over scheduling and dispatching drivers, while the Service Provider (Transdev) is required to
17 provide the drivers to drive the routes:

18 The Paratransit Control Center will be the point of public contact for ride
19 screening, ride scheduling, and dispatching. The Service Providers shall
20 receive trip schedules from the Control Center on a daily basis and shall send
21 out vehicles with drivers to provide the trips. The Service Provider, Control
22 Center dispatch, and the drivers shall be in contact via the Mobile Data
23 Computer (MDC) and will be able to have radio communication when
24 necessary. The Service Provider shall keep the Control Center informed of
25 vehicle availability.

26 The Control Center shall use TRAPEZE, (a computerized scheduling,
dispatch and information system) to develop schedules for vehicles and riders.
The Control Center's reservations, scheduling and dispatching staff shall
determine the specific ride for each eligible rider, which specific route a rider
shall ride on and which Service Provider shall provide the trip.

Dkt. No. 31-2, First Transit Contract § 4.1(B)(1)–(2).

This allocation of responsibility between First Transit and Transdev is central to
understanding the contractual relationship between the parties. Although Transdev is

1 responsible for employing the drivers, Transdev does not have the authority under the Contract
2 to set schedules or dispatch those drivers during their work day (and therefore cannot, for
3 example, adjust a driver's route in order to allow a driver to take his or her rest break).
4 Because Transdev has no control over scheduling and dispatching its drivers, however, the
5 Contract requires that First Transit assume those obligations to Transdev, including the duty to
6 ensure that Transdev's drivers receive rest breaks.

7 **C. Under the Contract, First Transit owes Transdev the duty to ensure**
8 **Transdev's drivers receive rest breaks.**

9 Section 6 of the Contract, "Scope of Work - Control Center," sets forth First Transit's
10 responsibilities, including its duties to Transdev. For example, the Contract requires First
11 Transit to communicate daily with Transdev and schedule Transdev's drivers with sufficient
12 notice, as follows:

13 Coordinate ACCESS with S.P.-Contractors [Transdev] and other
14 transportation programs: Plan and implement programs, which improve
15 service or efficiency through increased coordination with other transportation
16 services. Dkt. No. 31-2, First Transit Contract § 6.1(B)(3)(b).

17 Communicate daily with the S.P.-Contractors [Transdev] regarding vehicle
18 and driver availability, schedule adherence and any other operational issues.
19 *Id.* § 6.1(B)(3)(e).

20 Coordinate the flow of information from dispatch to the S.P.-Contractors
21 [Transdev] and back to the C.C.-Contractor [First Transit] management. *Id.* §
22 6.1(B)(3)(f).

23 Transmit vehicle shift schedules for the next day to the S.P.-Contractors
24 [Transdev], not later than 7 p.m., giving sufficient time for operators to
25 schedule vehicles and drivers. Actual manifests shall be transmitted as
26 appropriate for the start of the shift. *Id.* § 6.2(B).

The C.C.-Contractor [First Transit] shall schedule rides in a manner that
ensures that the S.P.-Contractor [Transdev] is able to deliver riders to their
destinations within the established time frame arranged when the ride was
requested. *Id.* § 6.5(D)(10).

First Transit's duties to Transdev also extend to supporting the drivers employed by
Transdev, including developing a plan to ensure driver rest breaks:

The C.C.-Contractor shall ensure that its scheduling personnel are assigned to
meet service level requirements and that its scheduling personnel meet the
following performance standards: . . . Incorporate feedback from drivers,
dispatch and reservationists to continually improve service and productivity.
(*Id.* § 6.3(B)(4).)

1 Regularly attend the Service Provider's monthly driver's meeting to assist
2 drivers in solving service problems. (*Id.* § 6.3(C)(7).)

3 The C.C.-Contractor [First Transit] shall work with S.P.-Contractors
4 [Transdev] to develop a plan to ensure driver breaks and lunches that shall
5 have the least impact on the provision of service. This plan shall conform to
6 applicable law. (*Id.* § 6.5(D)(12).)

7 Finally, and most importantly for purposes of this motion, First Transit is required to
8 provide dispatch coverage to ensure that Transdev drivers receive rest breaks on the day of
9 service: **"The C.C.-Contractor [First Transit] shall provide dispatch coverage for all
10 hours of transportation service operation. Additionally, the C.C.-Contractor [First
11 Transit] shall provide non-reservation coverage from 5:00 p.m. to 8:00 a. m. to process ride
12 inquiries, comments, and cancellations, to call riders with changes, to optimize service on day
13 of service, and to ensure that its drivers receive breaks and lunches."** (*Id.* § 6.5(D)(1)
(emphasis added).)

14 **D. Transdev directs its drivers to request breaks, if not scheduled, from First
15 Transit through the MDC.**

16 Transdev drivers are at the mercy of First Transit when it comes to getting rest breaks.
17 For the entirety of the putative class period, Transdev had told its drivers that, in the event no
18 break is scheduled or reasonably available during daily downtime, then they should first,
19 request a rest break through the MDC,² and second, if one is not given, call Transdev operators
20 who will then call First Transit and verbally demand a break. (Declaration of Leiite Lemalu ¶ 3
21 ("Lemalu Decl.")). That practice was reduced to a formal policy, which policy has been in
22 place for a significant portion of the putative class period. The current policy instructs drivers
23 to review their daily manifests prior to departing on their route so that they are aware of and
24 "know the scheduled times of all rest and meal breaks." (Declaration of Erik Zandhuis
25 ("Zandhuis Decl.") Ex. C, Transdev Meal and Rest Break Verification Policy at 1.) Transdev
26 drivers are further instructed that, if they encounter "a problem or service demands [that]

² Indeed, there is a **preset button** for requesting rest breaks that a driver can press and instantly communicate that message to First Transit's dispatchers. (Lemalu Decl. ¶ 3.)

1 require him or her to miss a scheduled rest or meal break, the Driver must immediately notify
2 the Control Center Dispatcher [First Transit] of the missed rest or meal break. If the dispatcher
3 fails to immediately resolve the problem, the Driver must immediately notify his or her
4 immediate supervisor or Window Dispatcher. If a break was missed, Drivers are expected to
5 identify possible downtime during the day during which he or she could take a rest or meal
6 break, and with approval from the Control Center Dispatcher [First Transit], take a rest or meal
7 break.” (*Id.* at 2.)

8 Although Transdev drivers are instructed to contact their supervisor if they do not
9 receive a break from First Transit, because Transdev does not have authority to make
10 dispatching or scheduling changes, the Transdev supervisor’s only recourse is to contact First
11 Transit in a further attempt to ensure the driver receives a break. (Lemalu Decl.¶ 4.) By way
12 of illustration, on November 20, 2015, one of Transdev’s operations managers, Leiite Lemalu,
13 sent an email to First Transit’s Operations Manager, Donna Sansoterra, regarding concerns
14 raised by a driver regarding her rest breaks. Mr. Lemalu states in his email that “I have
15 instructed our team [Transdev] to watch Mary’s route daily and do all we can to make sure she
16 is scheduled for her 2 breaks,” but he also notes that “[w]hen she calls us [Transdev] our only
17 option is to reach out to your team [First Transit] for help on her breaks or lunch and that
18 is usually an odd conversation since we are telling you what she had told you already.”
19 (Zandhuis Decl., Ex. D, Nov. 20–23, 2015 Email Correspondence.)

20 A few weeks later, on December 3, 2015, Ms. Sansoterra (First Transit) sent an email to
21 Mr. Lemalu (Transdev) acknowledging the complaints raised by Transdev’s drivers and First
22 Transit’s responsibility to correct any rest break violations:

23 We have drivers complaining about where their breaks are and
24 asking dispatch [First Transit] to move them if it will make them
25 late for a client. That is not always possible. We all know how this
26 works. While dispatch’s responsibility is to monitor the routes and
do what we can to keep them on time, it is not always
possible. . . . We cannot always have every route on time and
running beautifully. . . . **Drivers need to take their rest periods
where they are scheduled. If they are in violation it is our [First
Transit’s] responsibility to correct,** but if they refuse to take or

ask for it to be moved, that is out of our control.

(Zandhuis Decl., Ex. E, December 3, 2015 Email Correspondence.)

In sum, because Transdev does not have dispatching or scheduling control over its drivers, Transdev must rely upon First Transit to fulfill its contractual duty to ensure driver rest breaks, a duty that First Transit has acknowledged.

E. Plaintiffs allege that Transdev drivers were scheduled and dispatched in such a way that they were unable to take rest breaks.

Plaintiffs' claims against Transdev are predicated on allegations that the dispatching and scheduling of Transdev's drivers' routes made it impossible for them to take rest breaks during their work day. Specifically, Plaintiffs allege that "Defendants did not schedule rest breaks for any of their Drivers before March 1, 2015" and that, "[a]s a result of Defendants' policies and practices and the extremely tight schedules under which they are required to operate, Drivers had no opportunity to take the rest breaks to which they were entitled under the law before March 1, 2015." Dkt. No. 22, Am. Compl. ¶¶ 5.21–22. Similarly, Plaintiffs allege that "Starting March 1, 2015, Defendants began scheduling one rest break via the Driver's manifest and a second rest break via the onboard computer for each Driver shift" but that "[t]he first rest break is frequently scheduled to occur within the first fifteen minutes of the work day, and the second rest break is frequently scheduled to occur within the last fifteen minutes of the work day." *Id.* ¶¶ 5.24–25.

In sum, Plaintiffs allege that they were not scheduled or dispatched in such a way that allowed them the opportunity to take rest breaks while driving their routes. Because First Transit has exclusive control over scheduling and dispatching of Transdev's drivers—and the duty to Transdev to ensure that its drivers receive rest breaks—Transdev filed its cross-claim against First Transit for breach of contract (either in privity or, alternatively, as a third-party beneficiary). That cross-claim is valid and should not be dismissed by way of Rule 12(b)(6).

III. ARGUMENTS AND AUTHORITIES

In its crossclaim, Transdev seeks to enforce First Transit’s contractual duties to ensure driver rest breaks on two alternative theories of liability. First, because the contractual framework established by King County with respect to First Transit and Transdev establishes privity between the parties, the Court may construe both contracts as a single contractual relationship. Second, and in the alternative, Transdev is an intended third-party beneficiary of the contract between First Transit and King County. Under either theory, First Transit has assumed the contractual responsibility to schedule and dispatch Transdev’s drivers and to ensure that those drivers receive rest breaks. Because Transdev has, conversely, surrendered the right to dispatch and schedule its drivers, First Transit has the exclusive control over—and duty to provide—the driver rest breaks that are the subject of this lawsuit.

A. This is a Rule 12(b)(6) motion, and, as such, this Court must construe all evidence in favor of Transdev and all ambiguities against First Transit.

To avoid dismissal under Rule 12(b)(6), a plaintiff must aver in his complaint “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Furthermore, “[l]eave to amend should be granted unless the pleading could not possibly be cured by the allegation of other facts” *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1099 (9th Cir. 2004) (internal quotation marks omitted).

First Transit had a duty to schedule breaks for Transdev drivers, and there is evidence that, to the extent breaks were missed, First Transit may have breached that duty. Dismissal at this early stage – where *all* inferences must be read in Transdev’s favor – is inappropriate.

B. First Transit owes contractual duties to Transdev relative to plaintiffs’ rest break claims.

The unusual contractual framework established by King County required contractors to

1 bid on different portions of work—as either a Control Center or a Service Provider—within the
2 same contract. Whether that contractual relationship is characterized as a single contract
3 between three parties or as two separate contracts, First Transit nevertheless owes contractual
4 duties to First Transit (either as a direct party in privity or a third-party beneficiary).

5 **1. The Contract’s structure and execution make it such that First**
6 **Transit and Transdev are in contractual privity.**

7 The RFP published by King County for its paratransit service program contained a
8 single contract setting forth the scope of work for both the Control Center and the Service
9 Provider. Although it is true that King County executed its paratransit contract with First
10 Transit and Transdev as two separate instruments, they may be construed as one contract for all
11 intents and purposes because (i) their terms are identical, (ii) they were executed during the
12 same time period, (iii) they relate to the same subject matter, and (iv) they were executed as
13 part of the same transaction.

14 “Instruments which are part of the same transaction, relate to the same subject matter
15 and are executed at the same time should be read and construed together as one contract, even
16 though they do not refer to one another, or even though they are not executed between the same
17 parties.” *Turner v. Wexler*, 14 Wn. App. 143, 146 (1975) (emphasis added). *See also Kenney*
18 *v. Read*, 100 Wn. App. 467, 474 (2000) (“When several instruments are made as part of one
19 transaction, they will be read together and construed with reference to each other. This is true
20 even when the instruments do not refer to each other and when the instruments are not executed
21 by the same parties.”) (quotation marks and internal citations omitted).

22 In this case, all elements of the standard set forth in *Turner* have been satisfied. First,
23 the instruments King County executed with both First Transit and Transdev were undoubtedly
24 part of the same transaction because they resulted from the same RFP for a single contract.
25 Second, the instruments relate to the same subject matters because they are identical. And
26 third, the instruments were executed and became effective during the same period. *Compare*
Dkt. No. 31-1, Transdev Contract (August 1, 2008 contract start date), *with* Dkt. No. 31-2, First

1 Transit Contract (August 2, 2008 contract start date). The Court may therefore treat the
2 instruments executed between King County, First Transit, and Transdev as part of the same
3 contract for purposes of determining the parties' rights to one another.

4 **2. Transdev is an intended third-party beneficiary of First Transit's**
5 **contract with King County.**

6 Even if this Court concludes the parties are not in privity, Transdev fits precisely within
7 the definition of a third-party beneficiary to the contract between First Transit and King
8 County. "A third-party beneficiary contract exists when the contracting parties, at the time they
9 enter into the contract, intend that the promisor will assume a direct obligation to the claimed
10 beneficiary. The test of intent is an objective one: Whether performance under the contract
11 necessarily and directly benefits the third party." *Warner v. Design & Build Homes, Inc.*, 128
12 Wn. App. 34, 43 (2005). In determining the parties' intent, the Washington Supreme Court has
13 instructed that "[s]o long as the contract necessarily and directly benefits the third person, it is
14 immaterial that this protection was afforded . . . not as an end in itself, but for the sole purpose
15 of securing to the promisee some consequent benefit or immunity. In short, the motive,
16 purpose, or desire of the parties is a quite different thing from their intention." *Lonsdale v.*
17 *Chesterfield*, 99 Wn.2d 353, 361–62 (1983) (quoting *Vikingstad v. Baggott*, 46 Wn.2d 494, 497
18 (1955)).

19 The facts of *Lonsdale* are instructive. There, a real estate developer (Chesterfield) sold
20 residential lots to investors and promised that it would install a water system on each plat of
21 land. *Id.* at 355. Chesterfield subsequently contracted with Sansaria to install the water
22 systems for the investors. *Id.* at 355–56. When Sansaria failed to install the water systems, the
23 investors sued Chesterfield but, because Chesterfield had been dissolved in the interim, the
24 investors' only path to recovery was against Sansaria by asserting that they were third-party
25 beneficiaries to the contract between Chesterfield and Sansaria. *Id.* at 360. In concluding that
26 the investors were third-party beneficiaries to Chesterfield's contract with Sansaria, the
Lonsdale court held that "the contract necessarily required Sansaria, as the promisor, to confer

1 a benefit upon petitioners. Under the terms of the contract, Sansaria could not fully perform its
2 promise to install the water system without directly benefitting the petitioners as deeded owners
3 of the lots. Petitioners were thus intended third party beneficiaries of the performance due
4 under the contract.” *Id.* at 362-63.

5 Transdev is similarly a third-party beneficiary to the contract between King County and
6 First Transit because First Transit cannot fulfill its duties under that contract without conferring
7 numerous direct benefits to Transdev. Specifically, First Transit’s obligation to ensure
8 Transdev’s drivers receive rest breaks is a direct benefit conferred upon Transdev and which is
9 a benefit contemplated by the fact that Transdev does not have control over the scheduling and
10 dispatching of its own drivers and therefore cannot otherwise ensure that they have
11 opportunities for rest breaks.

12 First Transit attempts to analogize to this dispute to the facts in *American Pipe and*
13 *Construction Company v. Harbor Construction Company*, 51 Wn.2d 258 (1958), a construction
14 case that is completely distinguishable from these facts. In *American Pipe*, the City of
15 Anacortes contracted with one party to supply pipe to the city for a pipeline (the pipe supplier)
16 and another party to install the pipeline for the city (the pipe installer). Contrary to First
17 Transit’s convoluted explanation of that case, the Washington Supreme Court held that the pipe
18 installer was not a third-party beneficiary to the pipe supplier’s contract with the City for the
19 simple reason that “[n]owhere in this contract does the pipe supplier assume any obligation to
20 the installation contractor” *Am. Pipe & Const. Co. v. Harbor Const. Co.*, 51 Wn.2d 258,
21 267 (1957). In other words, the pipe supplier’s contract with the city did not contain any clause
22 or provision requiring the pipe supplier to perform any duty for the pipe installer.³

23 ³ As an additional basis for finding no third-party beneficiary status, the Court noted that the pipe installer also
24 could not enforce any purported time for delivery of the pipe for the reason that the city’s contract with the pipe
25 installer contained a clause permitting the delivery period to be altered by the City, and that any attempted
26 enforcement by the pipe installer would therefore interfere with the city’s rights under the contract. That fact also
is distinguishable from the present case because, unlike in *American Pipe*, First Transit’s contract with King
County does not contain any clause permitting King County to waive the requirement that First Transit ensure
Transdev’s drivers receive rest breaks.

1 First Transit also argues that this lawsuit is analogous to another distinguishable
2 construction contract case, *Del Guzzi Const. Co. v. Glob. Nw., Ltd., Inc.*, 105 Wn.2d 878
3 (1986). In *Del Guzzi*, Clallam County contracted with an engineering firm (Kennedy) to
4 design, plan, and supervise construction of a sewage system and separately contracted with a
5 general contractor (Del Guzzi) to perform the construction, and Del Guzzi in turn entered a
6 contract with a subcontractor (Global). *Id.* at 880. When Del Guzzi sued Global for damages
7 allegedly resulting from having to complete a portion of Global's work, Global filed a third-
8 party action against the County and Kennedy, alleging that Global was a third-party beneficiary
9 to the County's contracts with Kennedy and Del Guzzi. *Id.* at 881. Similar to *American Pipe*,
10 the Washington Supreme Court held that Global was not a third-party beneficiary to either
11 contract because nothing in those contracts indicated any intent of the parties to assume a direct
12 obligation to Del Guzzi. *See id.* at 887, 719 P.2d 120, 126 (1986) ("Kennedy's obligations ran
13 exclusively to the County and any benefits derived by Global from this contract are
14 incidental."); *id.* ("As for the construction contract between the County and Del Guzzi, nothing
15 reveals an intent on the part of the County to assume a direct obligation to Global.") Just as in
16 *American Pipe*, the facts of *Del Guzzi* are readily distinguishable from this case because
17 nothing in the contracts in those cases created any direct obligation to a third party. *Del Guzzi*
18 is distinguishable for the additional reason that, "[i]n the construction context, the prevailing
19 rule is that a property owner is generally not a third-party beneficiary of a contract between the
20 general contractor and a subcontractor." *Warner v. Design & Build Homes, Inc.*, 128 Wn. App.
21 34, 43 (2005). Unlike *Del Guzzi*, this lawsuit is not a construction dispute, and Transdev is not
22 a property owner attempting to benefit from a contract between a contractor and subcontractor.

23 **i. First Transit assumes numerous direct duties to Transdev,**
24 **including the duty to provide rest breaks to Transdev drivers.**

25 Here, in contrast with *American Pipe* and *Del Guzzi*, First Transit has assumed
26 numerous **direct and explicit** obligations to Transdev. For example, First Transit has promised
that it will:

1 Coordinate ACCESS with S.P.-Contractors [Transdev] and other
2 transportation programs: Plan and implement programs, which improve
3 service or efficiency through increased coordination with other transportation
4 services. Dkt. No. 31-2, First Transit Contract § 6.1(B)(3)(b).

5 Communicate daily with the S.P.-Contractors [Transdev] regarding vehicle
6 and driver availability, schedule adherence and any other operational issues.
7 *Id.* § 6.1(B)(3)(e).

8 Coordinate the flow of information from dispatch to the S.P.-Contractors
9 [Transdev] and back to the C.C.-Contractor [First Transit] management. *Id.* §
10 6.1(B)(3)(f).

11 Transmit vehicle shift schedules for the next day to the S.P.-Contractors
12 [Transdev], not later than 7 p.m., giving sufficient time for operators to
13 schedule vehicles and drivers. Actual manifests shall be transmitted as
14 appropriate for the start of the shift. *Id.* § 6.2(B).

15 The C.C.-Contractor [First Transit] shall schedule rides in a manner that
16 ensures that the S.P.-Contractor [Transdev] is able to deliver riders to their
17 destinations within the established time frame arranged when the ride was
18 requested. *Id.* § 6.5(D)(10).

19 The C.C.-Contractor shall ensure that its scheduling personnel are assigned to
20 meet service level requirements and that its scheduling personnel meet the
21 following performance standards: . . . Incorporate feedback from drivers,
22 dispatch and reservationists to continually improve service and productivity.
23 *Id.* § 6.3(B)(4).

24 Regularly attend the Service Provider's monthly driver's meeting to assist
25 drivers in solving service problems. *Id.* § 6.3(C)(7).

26 In addition, and most relevant to this dispute, First Transit assumed the obligation to
Transdev to ensure that its drivers receive rest breaks: **“The C.C.-Contractor [First Transit]
shall provide dispatch coverage for all hours of transportation service operation.
Additionally, the C.C.-Contractor [First Transit] shall provide non-reservation coverage from
5:00 p.m. to 8:00 a.m. to process ride inquiries, comments, and cancellations, to call riders with
changes, to optimize service on day of service, and to ensure that its drivers receive breaks
and lunches.”** (*Id.* § 6.5(D)(1) (emphasis added).)

Faced with this explicit obligation to ensure driver rest breaks, First Transit takes the
astonishing position that Section 6.5(D)(1) does not apply to drivers employed by Transdev
because the phrase “its drivers” is instead a reference to First Transit's drivers. First Transit
Opp. at 10 (“First Transit cannot have breached this clause with respect to Transdev's drivers,

1 because this clause requires First Transit to ensure that ‘its drivers’ receive breaks.”).

2 First Transit’s argument is disingenuous. As the Control Center, *First Transit does not*
3 *employ any drivers under the terms of the Contract; that is Transdev’s job.* In other words,
4 according to First Transit, Section 6.5(D)(1) is a requirement that First Transit provide rest
5 breaks to non-existent drivers. Such an absurd interpretation of Section 6.5(D)(1) would render
6 it meaningless, and therefore must be rejected. “Courts may not adopt a contract interpretation
7 that renders a term absurd or meaningless.” *MacLean Townhomes, L.L.C. v. Am. 1st Roofing &*
8 *Builders Inc.*, 133 Wn. App. 828, 831 (2006).

9 The only reasonable interpretation of the requirement that First Transit “ensure that its
10 drivers receive breaks and lunches” is that the term “its drivers” means the drivers that First
11 Transit schedules and dispatches throughout the day (*i.e.*, the drivers employed by Transdev).

12 **ii. First Transit has acknowledged its duty to Transdev to**
13 **ensure driver rest breaks.**

14 Regardless, any ambiguity as to whether First Transit owes a duty to Transdev to ensure
15 driver rest breaks is resolved by First Transit’s repeated acknowledgements of that duty.
16 Washington courts “follow the context rule that extrinsic evidence relating to the context in
17 which a contract is made may be examined to determine the meaning of specific words and
18 terms used in the contract. Extrinsic evidence includes both the contract’s subject matter and
19 objective, the circumstances surrounding contract formation, **both the parties’ conduct and**
20 **subsequent acts**, and the reasonableness of the parties’ respective interpretations.” *RSD AAP,*
21 *LLC v. Alyeska Ocean, Inc.*, 190 Wn. App. 305, 315 (2015) (quotation marks and internal
22 citations omitted).

23 For example, on December 3, 2015, First Transit’s Operations Manager, Donna
24 Sansoterra, sent an email to Transdev acknowledging First Transit’s responsibility to schedule
25 driver rest breaks and asking that Transdev instruct its drivers to take the breaks at the time
26 they are scheduled: “We have drivers complaining about where their breaks are and asking
dispatch to move them if it will make them late for a client. That is not always possible. We all

1 know how this works. While dispatch’s responsibility is to monitor the routes and do what we
2 can to keep them on time, it is not always possible.... Drivers need to take their rest periods
3 where they are scheduled. **If they are in violation it is our responsibility to correct**, but if
4 they refuse to take or ask for it to be moved, that is out of our control.” (Zandhuis Decl., Ex. E,
5 December 3, 2015 Email Correspondence (emphasis added).)

6 A month later, on January 8, 2016, Ms. Sansoterra sent an email to King County
7 acknowledging First Transit’s responsibility to ensure driver rest breaks and explaining a new
8 protocol First Transit had developed to monitor and ensure such breaks: “We think we finally
9 have a finished product. . . . Any time a driver has a period of work more than 3 hours without
10 a rest [break][,] a violation will show. As you can see by the percentages, **there is some work**
11 **to be done in my department. I now have a useful tool to manage dispatch performance**
12 **to coach/counsel [First Transit] dispatchers who are failing to get breaks in the correct**
13 **spot.”** (Zandhuis Decl., Ex. F, January 8, 2016 Email from First Transit (emphasis added).)

14 King County’s communications with First Transit and Transdev further demonstrate
15 King County’s expectation that First Transit has a duty ensure that Transdev’s drivers receive
16 rest breaks. For example, on November 19, 2015, Transdev’s General Manager, Erik
17 Zandhuis, emailed King County’s Administrator of Access Operations, John Rochford, to
18 notify him as an “FYI” that a driver had been having difficulty obtaining rest breaks. In
19 response, King County emailed First Transit’s Operations manager—and copied Transdev’s
20 General Manager—to ask why that driver was apparently refused a rest break by First Transit
21 when the driver attempted to take one:

22 **John Rochford (King County):** Donna here is a snippet from the 11/18 MDC
23 player. It looks to me like the driver attempted to take a break in between two
24 groups but was overruled [by First Transit]. What is the recourse?

25 **Donna Sansoterra (First Transit):** I interpret this as dispatch [First Transit]
26 explaining why the break was up against lunch. Driver advised he was taking
[a break] now and not with lunch and I am ok with that. It should have been
moved to the proper place already.

In sum, both the contract’s terms and the course of dealing between the parties makes

1 clear that First Transit, King County, and Transdev have always understood that First Transit
2 has a duty to Transdev to ensure that its drivers receive rest breaks. First Transit's attempts to
3 now disclaim any such duty must be rejected.

4 **C. Enforcing First Transit's duty to ensure driver rest breaks will promote,**
5 **rather than violate, public policy.**

6 In a final effort to shirk responsibility, First Transit takes the position that its contractual
7 duty to ensure that drivers receive rest breaks is "unenforceable as a matter of public policy."
8 First Transit Opp. at 15. First Transit argues that, because Transdev is the employer of the
9 drivers, enforcement of First Transit's contractual duty to ensure driver rest breaks would
10 "undermine the purpose of the rest break regulation, which is to ensure that employers provide
11 their employees rest breaks." *Id.* at 16.

12 First Transit relies upon just one Washington case, *Kilgore v. Shriners Hosps. For*
13 *Children*, 190 Wn. App. 429 (2015), in support of this proposition. That case is distinguishable
14 from the facts in this case because **it involved an employer suing its own employee** for
15 indemnity for the employee's purported failure to improperly administer payroll wages,
16 resulting in the employer's liability under the Washington Minimum Wage Act. There, the
17 Washington Court of Appeals concluded that "[t]hus, as with the FLSA, the MWA's statutory
18 goals would be undermined by diminishing the employer's compliance incentives **if an**
19 **employer were permitted to seek indemnity from its employees** for statutory violations."
20 *Kilgore v. Shriners Hosps. For Children*, 190 Wash. App. 429, 435 (2015) (emphasis added).

21 Unlike in *Kilgore*, here, Transdev is not seeking indemnity from its own employees for
22 their purported negligence, but rather attempting to enforce an explicit contractual duty
23 assumed by a third party, First Transit.

24 Ironically, if this Court were to accept First Transit's argument and hold that First
25 Transit's contractual duty is unenforceable, the result would be that Transdev—who has no
26 control over driver scheduling or dispatching under the Contract and is wholly dependent on
First Transit in that regard—would have no means to ensure that its drivers receive rest breaks.

1 As a result, Transdev could be exposed to open-ended liability and will be left without any
2 means to ensure that its drivers receive rest breaks. Meanwhile, First Transit would be
3 incentivized to increase its own profits by scheduling drivers to work through breaks.

4 To be clear, Transdev admits that it has the statutory responsibility to provide its
5 employees opportunities to take rest breaks. But Transdev's responsibility to its employees is
6 not mutually exclusive with First Transit also owing a contractual duty to Transdev to ensure
7 that the schedules it creates afford drivers ample opportunity to take their rest breaks.

8 IV. CONCLUSION

9 This very unusual contractual framework places Transdev in the uneasy spot of having
10 to rely on First Transit to provide Transdev's drivers with adequate break time. First Transit's
11 motion – a Rule 12(b)(6) motion – should be denied because First Transit does owe duties to
12 Transdev relative to scheduling driver rest breaks. Indeed, there is evidence (and Transdev
13 expects discovery will yield far more) of First Transit acknowledging this responsibility and of
14 a practice wherein drivers are asked to the MDC device to request breaks *from First Transit*.
15 Thus, dismissal on a Rule 12(b)(6) motion, before First Transit has produced a single document
16 or provided a single witness for deposition, is not warranted.

17 The motion to dismiss Transdev's crossclaim should be dismissed.
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1 RESPECTFULLY SUBMITTED this 14th day of November, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the parties.

Dated this 14th day of November, 2016.

s/Stellman Keehnel
Stellman Keehnel

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